

NTSB Order No. EA-4968

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of April, 2002

Respondent .

Docket SE-15654

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allegedly refusing to submit to a Department of Transportation ("DOT")-required drug test in violation of section 61.14(b), 14 CFR Part 61, of the Federal Aviation Regulations ("FARs").² We deny the appeal.

The Administrator's complaint alleged that on October 21, 1998, respondent, a first officer at the time with Spirit Airlines, provided a urine sample in accordance with Spirit's DOT-mandated random drug testing program for employees performing safety-sensitive functions. When subsequent analysis of respondent's sample by Quest Diagnostics, Inc. ("Quest") indicated that respondent's sample contained nitrites (8,387 µg/mL), a common adulterant, the Administrator initiated revocation proceedings.

The law judge's decision provides a lengthy recitation

² FAR § 61.14 provides, in relevant part:

§ 61.14 Refusal to submit to a drug or alcohol test.

* * * * *

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for:

(1) Denial of an application for any certificate, rating, or authorization issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate, rating, or authorization issued under this part.

of the hearing testimony, and for our purposes it is only necessary to note the disagreement about whether the collection cup was unsealed in respondent's presence immediately prior to respondent making use of it. The specimen collector could not recall respondent's drug test, but she testified, essentially, that it was her habit to conduct drug tests in accordance with the DOT procedures, including leaving the collection kits, and the individually-sealed components, unopened until in the presence of a donor. As the law judge noted, respondent "was persistent in his view and testimony that the collection kit itself ... had previously been opened, the wrappings were off and the cup, unwrapped, was out on the counter." Respondent denied adulterating his specimen, and testified that he had no idea where the nitrites came from, and numerous character witnesses testified that he would have no reason to adulterate his specimen.

The law judge focused on the conflicting evidence about whether the collection cup was unsealed outside of respondent's presence, and concluded that "a preponderance of the reliable and probative evidence does not establish that [r]espondent is, in fact, the sole source of that contamination because there is a question on the evidence in front of me as to whether the [collection procedure] was performed correctly." Transcript ("Tr.") at 338. In reaching his conclusion, the law judge made an implicit

credibility determination in favor of respondent's testimony that the collection cup was unsealed and, to be sure, his denial of any drug use or adulteration of his sample. See, e.g., Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (absent clear error, the Board defers to credibility determinations of the law judge).

On appeal, the Administrator argues that the law judge misconstrued the evidence, gave respondent's version of events undue weight, and placed an improper burden on the Administrator when he stated that she "must prove by a preponderance of the evidence that the nitrites were present in the specimen as a result of action by [r]espondent and reasonably exclude any other conclusion." Tr. at 329. Respondent, on the other hand, urges us to uphold what he argues was the law judge's credibility-based decision.

A fair reading of the law judge's decision as a whole reveals that he did not believe that the evidence proved that respondent adulterated his sample with nitrites. The law judge stated that "the evidence as to the collection process is a standoff," he credited respondent's denials, and he gave weight to the testimony of respondent's character witnesses. Given the credibility-based underpinnings of the law judge's factual findings, we will not disturb his ultimate conclusion that a preponderance of the evidence does not support the Administrator's charge that respondent adulterated his urine sample.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's Decisional Order dismissing the Administrator's Order of Revocation is affirmed.

CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. BLAKEY, Chairman, did not concur, and submitted the following dissenting statement:

I dissent from the Board's decision because the Administrator's charge is supported by a preponderance of the reliable, probative and substantial evidence. The Administrator showed that respondent's sample contained very high levels of an adulterant commonly used to mask drug use. The respondent's defense was to allege flaws in the collection process and to speculate about potential opportunities for contamination, without offering any explanation or any evidence as to how those possibilities could produce such excessive nitrite levels. See Commandant v. Sweeney, NTSB Order No. EM-176 at 5 (1994) ("we are unconvinced that there can be no *de minimus* or irrelevant breaches" of collection procedures and guidelines adopted by the Department of Transportation); see also Frank v. Federal Aviation Administration, 35 F.3d 1554, 1557 (Fed. Cir. 1994) ("[w]e are not prepared to say ... that a violation of procedures automatically and fatally undermines the chain of custody ... [e]ach case must be considered on its own merits"). Even if one accepts the respondent's denial of culpability as the law judge did, it does not overcome the bulk of the evidence -- including the fact that respondent, alone, had the opportunity and motive to submit a spurious sample -- supporting the Administrator's charge. The fact that respondent speculated that someone else could be responsible for the adulterant found in his sample -- without offering evidence or reasonable explanation to support such speculation -- does not shift the burden to the Administrator to prove that respondent actually adulterated the sample. The majority's failure to insist that respondent prove his speculative arguments with factual and scientific evidence endorses an unrealistic and unfair evidentiary standard that can only hinder the Administrator's efforts to rid aviation of unlawful and dangerous drug use. I would grant the Administrator's appeal and affirm her revocation order.